(3)

No. 92-1941

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY W. CARLTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent devotes the bulk of the brief in opposition to the contention that this case turns solely on a question of fact (Br. in Opp. 6-14). Respondent claims that the "fact-bound determination" (*id.* at 14) that controls this case is simply whether, or not, respondent had "constructive notice" of the curative change that Congress enacted to Section 2057. See also Br. in Opp. 19, 27. Building upon this inaccurate description of the question presented and decided by the courts below, respondent claims that the decision of the court of appeals is "narrowly written" and merely applies settled law to the particular facts of this case (*id.* at 27).

Respondent's description of the decision cannot be reconciled with the words of the court's opinion. It

also manifestly undervalues the importance of the issues at stake.

1. The constitutional standard for testing the validity of retroactive legislation under the Due Process Clause is not—and has never been—whether or not the taxpayer had "constructive notice" of the change. Courts have sometimes noted, as a matter of law (not of fact), that taxpayers "must be prepared" for the possibility of changes in the tax laws and that "[n]obody has a vested right in the rate of taxation" (*Cohan* v. *Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (L. Hand, J.)). But the constitutional standard, clearly described in this Court's opinions, is "met simply by showing that the retroactive application of the legislation" is rationally designed to accomplish a "legitimate legislative purpose" (*Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729, 730 (1984)). Accord, *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989).

Accordingly, the Court has emphasized on several occasions that retroactive legislation—even without any notice, constructive or otherwise—"is not unlawful solely because it upsets otherwise settled expectations" (*Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, No. 91-904 (June 14, 1993), slip op. 34, quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. at 729-730). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). Retroactive curative legislation that is designed to correct acknowledged errors in prior enactments is properly and routinely upheld under the Due Process Clause because its retroactivity is rationally designed to accomplish legitimate governmental interests. See, *e.g.*, *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 428 (1931) (Congress's

"power to enact curative statutes" is "unquestionably valid") (quoting *United States* v. *Heinszen & Co.*, 206 U.S. 370, 387 (1907)). See also Pet. 14-16 & n.10. Respondent errs in ignoring this controlling body of case law and in seeking to characterize the decision below as simply a "fact-bound determination" concerning the presence or absence of "constructive notice" of the changed law (Br. in Opp. 14).

2. Respondent also errs in suggesting that the decision of the court of appeals is "narrowly written" (Br. in Opp. 27). To the contrary, in an effort to avoid the modern holdings of this Court, the court of appeals has struggled to justify a new and unsupported three-part due process test that looks to (i) whether the taxpayer had "actual or constructive notice that the tax statute would be retroactively amended" (Pet. App. 17a), (ii) whether the taxpayer relied "to his detriment on the pre-amendment tax statute" (*ibid.*), and (iii) whether such reliance was "reasonable" (*ibid.*). Implicitly recognizing that this formula has no support in the Constitution or this Court's decisions, respondent makes no effort to justify (or even to address) it.

Instead, respondent makes the broad (and equally unsupported) assertion that retroactive tax legislation without "notice" to the public is inherently unfair and is therefore "arbitrary and irrational" (Br. in Opp. 22). Evading this Court's due process decisions entirely, respondent seeks to rely on academic writings concerning other provisions of the Constitution which generally suggest that the "government must keep its word" (*id.* at 23).

Legislation is not a promise. Legislation seeks to accomplish public objectives through mandatory standards. When Congress makes a mistake in the phrasing of its legislation, it is in the public interest for that mistake to be corrected. This Court has recognized this fact by endorsing the "unquestionably valid" power of Congress to "enact curative statutes" (*Graham & Foster* v. *Goodcell*, 282 U.S. at 428).

The decision of the court of appeals, and the unsupported three-part test that it adopts, seeks to turn the Due Process Clause into a promissory estoppel clause. It cannot reasonably be suggested that the court of appeals' effort to engage in such a drastic revision of basic constitutional principles reflects a "narrowly written" decisional approach.

Moreover, while, in our view, it is not relevant to the constitutionality of the statute involved in this case, we note that respondent does not dispute that the claimed "detrimental reliance" of the taxpayer on the original language of the statute is largely illusory. As the petition points out, by engaging in market transactions in MCI stock, respondent could have made a profit as easily as a loss (Pet. 4 n.6 & 21).

Respondent claims that, but for the statute, he would not have made the sale to the corporation at a "below-market" (Br. in Opp. 22) discount of 26 cents per share (Pet. App. 4a). But, as we have explained (Pet. 4 n.6), and as respondent does not dispute, if respondent had purchased the MCI shares only a few days earlier and sold the stock with the same discount on the same day that the sale in fact occurred, respondent would have made a profit of $825,000 on

the transaction instead of a "loss" of $631,000. It was the timing of respondent's purchases, not the inevitable application of the statute, that produced the "loss" for the estate. In either situation, the amount of the claimed deduction under Section 2057 would be the same (Pet. 6 n.4).

Under the court of appeals' theory, the retroactive amendment to Section 2057 would evidently have been constitutional if respondent had purchased the MCI stock on December 3, 1986, instead of on December 10, 1986, for respondent would then have no "detriment" of which to complain. There is no precedent for such wavering constitutional guidelines for retroactive legislation.

3. For the reasons we explain in the petition (Pet. 23-24), the decision in this case merits this Court's review. The court of appeals has held a statute of Congress unconstitutional. In doing so, the court has adopted a novel constitutional test that imposes evidently insurmountable obstacles to ordinary legislative action. In this year, like most others, Congress is in the process of adopting extensive revisions to the tax laws. There is often little if any advance warning of the details of such legislation: changes in proposed tax provisions are often made (and entirely new provisions are often added) in Conference Committee without any public notice. It is a common practice for such revisions to be retroactive in varying degrees. The decision of the court of appeals in this case threatens substantially to interfere with the ordinary enforcement of such revenue laws in a circuit that encompasses a large portion of our Nation's taxpayers and economic activity.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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